

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Exeter Country Club Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid employee expenses
RSA 275:43-b unpaid salary
RSA 275:48 I/II illegal deductions
RSA 275:44 IV liquidated damages
RSA 279:21 VIII unpaid overtime

Employer: Exeter Country Club Inc, 58 Jady Hill Ave, Exeter, NH 03833

Date of Hearing: December 3, 2015

Case No.: 51564

BACKGROUND AND STATEMENT OF THE ISSUES

Prior to 8:15am, the scheduled start time of this hearing, the claimant contacted the Department to advise he would not arrive until 8:30am. This hearing began at 8:45am, after the claimant still had not appeared, pursuant to Lab 203.04. The claimant appeared for the hearing at 9:02am.

The employer agreed to add the issues of RSA 275:48 I/II illegal deductions and 275:44 IV liquidated damages at the hearing, waiving the fourteen day notice period, pursuant to Lab 204.02.

The claimant asserts he is owed \$59.19 in unpaid employee expenses for mileage; \$391.00 the employer deducted from his wages for books; \$733.38 in unpaid overtime because he does not know if the employer is classified as seasonal or not; and \$1,200.62 in unpaid salary for pay periods August 9 through 15, 2015, August 23 through 29, 2015 and September 13 through September 16, 2015. He further seeks liquidated damages in the amount of \$521.01.

The employer agreed to pay the mileage reimbursement in the amount of \$59.19. He disagrees that it is due, however, he did authorize mileage reimbursement for one trip and he is unclear as to whether the communication with the claimant was specific to the one trip.

They argued the deduction from the claimant's wages for books is allowable pursuant to the written agreement between the parties, previously submitted. The contract allowed the employer to deduct the cost of the books if the claimant did not fulfill two conditions: 1- the books are returned to the Country Club at the completion of the course and 2- that the claimant is willing to work at the club for the 2015 golf season and provide satisfactory work service to be determined by the Superintendent. As the employer terminated his employment for poor performance, he did not meet the both criteria.

They further denied the claimant is due the any overtime as he worked for two separate entities which are seasonal.

The employer also noted they changed the claimant to an hourly employee in June 2015, therefore any claims for salary after that date are not valid.

The employer stated they believe the claimant has been paid all wages due.

The hearing was left open until 4:30pm on December 17, 2015, for the employer to submit the check of \$59.19 for mileage reimbursement. The employer submitted the check within the required timeframe.

FINDINGS OF FACT

The employer submitted the mileage reimbursement check for \$59.19, which the Department previously forwarded to claimant. The Hearing Officer makes no findings on this issue.

The claimant argued the employer illegally deducted \$391.00 for books from his wages.

Both parties signed an agreement on December 12, 2014, which stated that Joseph Mikulsky of the employer agreed to pay the \$391.00 in books associated with a golf management course being taken by the claimant, providing that he satisfy certain criteria: 1- the books are returned to the Country Club at the completion of the course and 2- that the claimant is willing to work at the club for the 2015 golf season and provide satisfactory work service to be determined by the Superintendent. The employer terminated his employment via letter on September 18, 2015, various reasons, including causing damage to the golf course, as a result of his poor performance.

The claimant did not meet both of the criteria set forth in the agreement for the employer to cover the cost of the books.

RSA 275:48 Withholding of Wages I (b) allows an employer to make certain deductions from an employee's wages if they have first secured a written authorization by the employee for deductions, which for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner:

(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner , as provided in subparagraph (d) or for any of the following:

(12) For any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or

her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business. Nothing in this subparagraph shall prohibit a charitable organization from withholding from an employee's wages a voluntary contribution to such charitable organization.

and:

(d) Upon an employee's written request, an employer may deduct the following items from the employee's wages, provided that the employer shall provide a written itemized accounting of such requested deductions to the employee at least once per month:

(5) Voluntary payments for the recovery of tuition for non-required educational costs paid by the employer for the employee to an educational institution when the specific deduction is authorized in writing prior to the deduction as evidenced by a document that includes the following:

(A) The time the payments will begin and end.

(B) The amounts to be deducted.

(C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.

The Hearing Officer finds the employer completed the proper documentation to deduct the \$391 from the claimant's final wages. Therefore, the claimant fails to prove by a preponderance of the evidence that he is due the claimed illegal deductions.

The claimant alleged he may be due \$733.38 in unpaid overtime because the employer did not pay overtime wages in 2014 when he was an hourly employee. He does not know if the employer is exempt as a seasonal employer or not.

The employer argued that the claimant worked for two separate entities, Exeter Country Club Inc and The Grill on the Hill LLC, and did not work greater than forty hours for any one employer. He further argued that both entities are considered seasonal under the FLSA, Defendant's Exhibit #1.

The employer meets the criteria in RSA 279:21 VIII (a) to be considered seasonal and therefore is exempt from paying an overtime rate to employees, pursuant to Defendant's Exhibit #1.

The claimant provided handwritten lists of dates and times he worked greater than forty hours. He did not provide any payroll information to show the hours paid or which hours he worked for the separate entities to prove he is due any overtime pay.

The Hearing Officer finds the claimant failed to prove he is due any overtime pay from this employer.

The claimant alleged he did not receive his full \$700 weekly salary for the pay periods of August 9 through 15, 2015, August 23 through 29, 2015 and September 13 through September 16, 2015.

He worked August 9, 2015, and received \$91.88 for the week. He seeks \$608.12 as due.

He worked August 28 and 29, 2015, and received \$236.25 for the week. He seeks \$463.75 as due.

He alleges he worked September 13 through 16, 2015, when the employer terminated his employment. He received \$271.25 for the week. He seeks \$128.75 due as he prorated his \$700 weekly salary to \$100 per day as he only worked four days of the pay period.

The employer argued the verbally notified the claimant on June 22, 2015, that he would receive \$700 weekly for a minimum of forty hours of work. The employer credibly testified they believed this changed the claimant to an hourly basis from his previous salary basis. As such they paid the claimant on an hourly basis for those weeks in which he did not work forty hours.

Further, the claimant took an unexpected and unauthorized vacation from August 10 through August 27, 2015, which left the employer in a poor coverage position for the club.

The employer also terminated the claimant on September 16, 2015, after believing he had walked off the job earlier in the week.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer failed to properly notify the claimant of his rate of pay as required. Further, the employer's own description of the verbal notification does not indicate the claimant would be changed to an hourly basis, but to receive a set amount of money, \$700, for a minimum of forty hours of work.

RSA 275:42 VI. The term "salaried employee" means any employee who under an employment agreement or as a matter of policy or practice, regularly receives each pay period a predetermined or fixed amount of money constituting compensation, based on a predetermined amount of wages to be paid as determined by a daily rate, weekly rate, bi-weekly rate, semi-monthly rate or monthly rate, and which amount is not subject to reduction because of variations in the quality or quantity of the work performed and regardless of the hours or days worked except as otherwise provided in RSA 275:43-b.

RSA 275:43-b requires that an employer pay a salaried employee their full salary for any pay period in which the employee performs any work. It also allows employers to make deductions to a salaried employee's wages under certain circumstances, but none of those exceptions apply to the facts of this case.

The claimant did not complete a time card, though the parties disagree as to whether or not he was told he was required to do so. The claimant received the same salary each week, with an exception for a brief increase over the summer of 2015, and the three pay periods in question.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed salary as follows:

- August 9 through August 15, 2015 \$608.12
- August 23 through August 29, 2015 \$463.75
- September 13 through September 19, 2015 \$428.75

The claimant sought \$128.75 for the week of September 13 through September 19, 2015, as his calculation was based on a prorated amount of \$100 per day due for four days worked. RSA 275:43-b requires payment of the full salary unless the employee is terminated for cause.

The current standard for a "for cause" termination is established by Lakeshore Estates Associates LLC v Michael F. Walsh (Belknap Superior Court No. 06-E-259, April 4, 2007). The Decision sets the standard as, "articulated at 82 Am. Jur. 2D *Wrongful Discharge* § 183 (2003), which provides that an employer may dismiss an employee "for cause" if the employee engages in misconduct. An employee's misconduct must comprise reasonable grounds for termination, and the employee must have received notice, express or fairly implied, that such misconduct would be grounds for termination. 82 Am. Jur. 2D *Wrongful Discharge* § 179 (2003); see also *Lowell v U.S. Sav Bank*, 132 N.H. 719, 726 (1990) (an employer must offer an employee a proper reason for a "for cause" dismissal). In reviewing a "for cause" dismissal, "the fact finder must focus not on whether the employee actually committed misconduct, but rather on whether the employer reasonably determined it had cause to terminate." 82 Am. Jur. 2D *Wrongful Discharge* § 179 (2003)".

As the employer did not notice the claimant that his actions could result in termination, he could not terminate the claimant "for cause". Therefore, the claimant is owed the remainder of his full \$700 weekly salary, or \$428.75.

The claimant seeks liquidated damages for the employer's failure to pay the \$128.75 salary for his final week, \$391.00 for illegal deductions and \$59.19 for employee mileage.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The Hearing Officer found the claimant failed to prove the deduction of \$391.00 was illegal, therefore, no liquidated damages can be assessed for this issue.

The employer provided credible testimony that they genuinely believed they had paid the claimant all wages due correctly and in accordance with the law.

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good case failed to pay him all wages due in the time required because the employer had a genuine belief that the

wages were not owed.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met his burden in his claim for salary. He did not meet this burden in his claims for illegal deductions, overtime and liquidated damages.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed illegal deductions, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$1,500.62 (\$608.12 + \$463.75 + \$428.75).

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$1,500.62 (\$608.12 + \$463.75 + \$428.75), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: December 10, 2015

cc: Exeter Country Club Inc, 58 Jady Hill Ave, Exeter, NH 03833

MJD/mjd